

NOT FOR PUBLICATION - For upload

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

TYRA LANG,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 2000-100 M/B
)	
UNITED STATES OF AMERICA, TIP TOP)	
CONSTRUCTION, INC., and RAMON)	
SANTIAGO d/b/a EASTERN CARIBBEAN)	
ELECTRIC, THE KING CHRISTIAN HOTEL)	
and HY-SECURITY GATE, INC.,)	
)	
Defendants.)	

ATTORNEYS:

Lee J. Rohn, Esq.
St. Croix, U.S.V.I.
For the plaintiff,

AUSA Ernest F. Batenga, Esq.
St. Croix, U.S.V.I.
For the defendants.

MEMORANDUM

Moore, J.

In her complaint, Tyra Lang ["Lang" or "plaintiff"] seeks damages for personal injuries incurred on November 7, 1999, when a controlled-access gate at a Christiansted National Historic Site came down on her head. The United States moves to dismiss under Federal Rule of Civil Procedure 12(b)(1) on the ground that Lang has failed to exhaust her administrative remedies, thereby depriving this Court of subject matter jurisdiction. For the

reasons stated below, the Court will deny the United States' motion.

The plaintiff proceeds against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b) ["FTCA"]. As required by the governing statute of limitations and regulations promulgated by the Attorney General, Lang "presented" her claim on January 14, 2001 to the National Park Service in the form of an executed standard Form 95. See 28 U.S.C. § 2401(b) (requiring claims against the United States to be "presented" within two years of accrual); 28 C.F.R. § 14.2(a) (providing that a claim is deemed to have been "presented" when the agency receives an executed standard Form 95). On her standard Form 95, Lang answered the applicable questions, describing the date, location, and nature of the alleged accident. She also provided the name and address of a witness, and stated a sum certain as the amount of claimed damages. (See Pl.'s Response Ex. 1A (executed Standard Form 95).)

According to the instructions printed on the back of the form, "the amount claimed should be substantiated by competent evidence," which includes "a written report by the attending physician . . . attaching itemized bills for medical, hospital, or burial expenses actually incurred." (*Id.* Instructions, section (a).) The instructions further provide that "failure to

completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim 'invalid.'" (*Id.* section (d).) Lang did not forward an attending physician's report with her executed Form 95.

After waiting six months without hearing from the National Park Service regarding her claim, she instituted this action against the United States, Tip Top Construction, Inc., Ramon Santiago d/b/a Eastern Caribbean Electric, the King Christian Hotel, and Hy-security Gate, Inc. See 28 U.S.C. § 2675(a) ("The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim."); see also *id.* § 2401(b) (action against United States must be brought within six months of the agency's final denial of the claim).

The United States concedes for purposes of this motion that Lang did not hear from the agency during the six-month period after it received her Form 95. It asserts, however, that Lang's Form 95 was deficient at the outset -- and thus not properly "presented" to the National Park Service -- because she failed to provide a physician's report as "requested" by the instructions on the back of the form. As a result, the United States argues, Lang has failed to exhaust her administrative remedies, depriving

this Court of jurisdiction over her claim. See 28 U.S.C. § 2675(a).

Section 2675 provides, in relevant part:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *unless the claimant shall have first presented the claim to the appropriate Federal agency*

Id. (emphasis added). Regulations promulgated by the Attorney General provide, in relevant part:

For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident

28 C.F.R. § 14.2(a). Thus, it is clear that a plaintiff's failure to present an "executed Form 95" would deprive this Court of jurisdiction. But Lang did timely present an executed Form 95, which fully complied with 28 C.F.R. § 14.2(a). Lang filled out the form in its entirety, including a specific dollar amount for alleged personal injury. For purposes of proper presentation under 28 C.F.R. § 14.2(a) and the notice requirements of 28 U.S.C. § 2675, she was required to do no more.

The instructions on the back of the form, so heavily relied

on by the United States, contain only a single reference to "invalid presentation": "Failure to specify a sum certain will result in invalid presentation of your claim" (See Pl.'s Response Ex. 1A, Instructions.) Nowhere is it stated or suggested that failure to forward a doctor's report will result in invalid presentation. Instead, the instructions state that "the amount claimed *should be* substantiated by competent evidence." (See *id.*, section (a) (emphasis added).) This is not the language of a jurisdictional prerequisite. Moreover, the instructions also indicate that for purposes of pursuing her claim with the agency, Lang had two years to provide the doctor's report. That she may at some time be required to provide substantiating evidence to preserve and perfect her agency claim does not mean that she must have done so to properly "present" her claim under the notice provisions of 28 U.S.C. § 2401.

This conclusion is supported by the language of 28 C.F.R. § 14.2(a) itself, which provides that a claimant does not have to use a Form 95 to the agency but may provide some other form of written notification "accompanied by a claim for money damages in a sum certain." See 28 C.F.R. § 14.2(a). If Lang could have properly presented her claim by sending a letter describing the incident and stating a claim for a sum certain in money damages, the Form 95 she submitted was surely adequate.

The Court of Appeals for the Third Circuit has considered whether a trial court properly dismissed with prejudice a plaintiff's FTCA claim as time-barred because she had not forwarded her doctor's report as expressly requested by an agency official. See *Tucker v. United States Postal Serv.*, 676 F.2d 954 (3d Cir. 1982). The Court of Appeals reversed the trial court, stating that

"[a]n individual with a claim against the United States . . . satisfies section 2675's requirement that 'the claimant shall have first presented the claim to the appropriate Federal agency' if the claimant (1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate and (2) places a value on his or her claim."

Tucker, 676 F.2d at 959 (quoting *Adams v. United States*, 615 F.2d 284, 288-91, *clarified*, 622 F.2d 197 (5th Cir. 1980)). Even though the claimant in *Tucker* failed to provide the doctor's report as expressly requested by the agency, the Court of Appeals held the claim was properly "presented" for purposes of 28 U.S.C. § 2675 because it was properly and completely filled out, including the amount of money damages claimed. As a result, the court concluded, dismissal of the case as time-barred was improper.

The United States argues here that *Tucker* does not preclude the dismissal of this case without prejudice because it was filed prematurely, before the United States had a chance to engage in

settlement procedures. It points to language in *Tucker* suggesting that the question whether this Court may dismiss an FTCA claim as premature has not yet been decided in this jurisdiction. See *Tucker*, 676 F.2d at 960 (discussing the holding in *Swift v. United States*, 614 F.2d 812 (1st Cir. 1980), where the First Circuit Court of Appeals affirmed a district court's dismissal of an FTCA case as premature). In *dicta*, however, the *Tucker* panel questioned whether a dismissal for prematurity is supported by the statutes or regulations, and further stated that "no strong policy seems to require a dismissal and a refiling if no settlement [of the agency claim] is reached." *Id.* As stated by Judge Gibbons writing for the panel, "the government can, once an action is filed, obtain evidentiary support for the claim through normal discovery, and can settle the case as easily as it can settle the claim." *Id.*

In light of the foregoing, this Court declines to interpret the applicable statutes and regulations in such a manner that would allow for dismissal of this case as premature. Accordingly, the United States' motion to dismiss for lack of jurisdiction will be denied. An appropriate order follows.

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ENTERED this 11th day of April, 2002.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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UNITED STATES OF AMERICA, TIP TOP)	
CONSTRUCTION, INC., and RAYMON)	
SANTIAGO d/b/a EASTERN CARIBBEAN)	
ELECTRIC, THE KING CHRISTIAN HOTEL)	
and HY-SECURITY GATE, INC.,)	
)	
Defendants.)	

ORDER

For the reasons stated in the accompanying Memorandum of even date, it is hereby

ORDERED that the United States's motion to dismiss for lack of subject matter jurisdiction (Docket # 22) is **DENIED**.

ENTERED this 11th day of April, 2002.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:

WILFREDO F. MORALES

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Clerk of the Court

By: _____
Deputy Clerk

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